IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1025 OF 2003
IN
SUIT NO.2140 OF 1999

M/s. Harsha Agencies. ..Plasintiffs.
Vs.
M/s. XACA (India) Pvt. Ltd. ..Defendants.
Vs.
The State of Maharashtra. ..Applicant.

Mr. A.A. Kumbhakoni, Addl. Advocate General with Ms. Geeta Shastri, AGP for the applicants in Chamber Summons No.1025/2003.

Mr.U.N. Kapoadia for the Plaintiffs.

Mr. A.Panicker i/by Khaitan & Jaykar for Intervenors.

CORAM : A.M. KHANWILKAR, J.
DATED : 14/6/2005

P.C.:

1. Heard counsel for the parties.

2. This chamber summons has been taken out by the State of Maharashtra through the Asstt.Commissioner of Sales Tax, Mumbai for leave under Order 21 Rule 52 of the Code of Civil Procedure to attach the movable and immovable property belonging to the first defendant and to allow the applicant to recover the arrears of sales tax dues. It is

further prayed that the applicant be given priority over all other creditors of the 1st defendant and necessary directions be given to the court receiver High Court, Mumbai, in view of the provisions of Section 38C of the Bombay Sales Act,1959. Suffice it to observe that, the properties of the defendant No.1 have been disposed of by the Court Receiver on 14.2.2003 and sale proceeds recovered is in the sum of Rs.18,20,000/-. The applicant has asserted in affidavit that the sale tax adjudication proceeding against the first defendant for the Assessment years 1992-93 to 1997-98 has become final under the provisions of Bombay Sales Tax Act only in October and December,2000. It is stated on affidavit that thereafter the sales tax department made efforts to recover the sales tax dues as has been finally computed by the department against the movable property of defendant No.1. However, the property available for attachment was insufficient to take care of the outstanding sales tax dues of the defendant No.1 which I am informed is to the extent of Rs.6,62,111/-. The breakup whereof is provided in Exh.4 to the chamber summons.

3. The fact remains that there are sales tax dues against the first defendant. The sales tax

department has made efforts to initially attach the movable property to recover the sales tax dues of the defendant No.1. It is stated on affidavit that the said amount was inadequate to recover the sales tax dues. In this back drop, the department has approached this court by way of present application for leave and for appropriate directions to enforce its first charge in terms of Section 38C of the Bombay Sales Tax Act (hereinafter referred to as the Act), which provision reads thus:

> "Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge in any Central Act for the time being in force, any amount of tax, penalty, interest or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or, as the case may be, person".

4. To get over this position, the counsel for the plaintiffs contends that the sales tax department ordinarily may have first charge in terms of Section

38C of the Act, however, in the present case the department has resorted to the present action at the instance of the Defendant No.1. It is further contended that no sales tax was applicable to the property which have been disposed of by the office of the court receiver. It is also argued that sales tax dues claimed by the department are for the period between 1992 to 1997 and Section 38C has been inserted w.e.f.6.2.1999, for which reason, it cannot be given retrospective effect. The counsel for the plaintiffs pressed into service other contentions which in my view are not relevant for deciding the present proceeding.

5. Having considered the rival submissions there can be no doubt that by virtue of Section 38C of the Act, sales tax department will have first charge over all the properties of the defendant no.1 for recovery of sales tax dues from the defendant No.1. Indeed, the department can legitimately lay its claim of first charge even in respect of the sale proceeds available with the court receiver for disbursement, recovered from the disposal of the property belonging to the first defendant who is in default of the sales tax dues. The argument that the claim of the department is at the behest of

Defendant No.1 is of no avail. For that claim arises out of statutory provision. Similarly, the argument that said provision has been inserted w.e.f. 6.2.1999 and cannot be given retrospective effect clearly overlooks the facts stated in the affidavit that the sales tax dues were finally adjudicated in the sales tax proceedings which concluded in October,2000 and December,2000 respectively. In other words, the arrears of sales tax dues of the defendant No.1 have become due and payable only after October and December,2000 and in any case after 6.2.1999. Therefore, the argument that the said provision has no application to the case in hand is ill-advised. Even the argument that no sales tax is applicable to the sale of the property effected by the court receiver is inappropriate. Inasmuch as, the department is not claiming the dues arising out of the sale proceeds as such, but is claiming first charge on the sale proceeds of the property of the defendant No.1 in relation to the outstanding dues to be recovered from the Defendant No.1. The sale proceeds in the hands of the court receiver is in the nature of property of the defendant No.1 is, therefore, amenable to first charge under Section 38C of the Act.

6. In my opinion, in view of the express provision of Section 38C, no other argument raised on behalf of the plaintiffs would be of any avail. The claim of the plaintiffs is founded on contract between the parties. Section 38C clearly overrides claim under any contract between the parties which is contrary to the purport of Section 38C. Viewed in this perspective, the chamber summons deserves to be allowed.

7. Accordingly, the same is made absolute in terms of prayer clause (a) and (b). No orders are required in terms of prayer clause (c) because the properties are already sold by the office of the court receiver. No order as to costs.

(A.M.KHANWILKAR,J.)